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HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 84 of 2006

APPELLANT Nazeer Ahmed

Vs.

RESPONDENT State of Madhya Pradesh

Judgment post for 18-9-2007

Sd/-
Dhirendra Mishra
Judge

(36)

HIGH COURT OF CHHATTISGARH AT BILASPUR
Criminal Appeal No. 84 of 2006

APPELLANT Nazeer Ahmed, S/o Bashir Ahmed aged about 28 years, occupation vegetable seller, R/o Camp 2, near Tadi Shop, Police Station Chhawani, Distt. Durg (CG)

Vs.

RESPONDENT State of Madhya Pradesh through District Magistrate, Distt. Durg (CG)

PRESENT: Shri Ravish Verma, Advocate for the appellant.
Shri Sandeep Yadav, Dy. Govt. Advocate for the State.

J.U D G M E N T
(18-9-2007)

This criminal appeal is directed against the judgment of conviction and order of sentence dated 25-1-2006 in NDPS Special Case No. 5/2005 whereby learned Special Judge (NDPS Act), Durg has convicted the appellant under Section 8(c) read with Section 20(b)(ii)(B) of Narcotic Drugs and Psychotropic Substances Act, 1995 (for short hereinafter referred to as N.D.P.S. Act) and sentenced to undergo R.I. for 3 ½ years and fine of Rs. 10,000/-, in default of payment of fine to undergo additional R.I. for 6 months.

2. Case of the prosecution, in brief, is that the Sub Inspector K.K. Nag (P.W. 6) was on patrolling duty when he received secret information that the appellant trades in cannabis from his house and he has stored cannabis with a purpose to sell the same in his house. The secret information was recorded by him vide Ex. P-17 and information about the same was forwarded to the City Superintendent of Police vide Ex. P-12, however since City Superintendent of Police was not available in the police station, therefore, memorandum of Ex. P-1 was prepared for affecting search without search warrant and thereafter the police proceeded for the house of the appellant and the accused was apprised about the information received by the Investigating Officer and sought his consent for search vide Ex. P-2 whereupon the appellant gave in writing that he has no objection to be searched by the Investigating Officer K.K. Nag. Thereafter the raiding party gave their personal search vide Ex. P-3 and after that the house of the accused was searched and cannabis was found in a plastic bag from a room vide recovery memo of Ex. P-4. The seized contraband was identified vide

identification memo of Ex. P-4. Weighment of the contraband was done in the nearby shop and total quantity was found as 5.450 kg. Weighment memo is Ex. P-6. Three samples of 50 gm each were seized from the seized contraband and after preparing sample memo of Ex. P-7, the same were duly sealed in presence of the accused and seizure memo of Ex. P-9 was separately prepared. Thereafter F.I.R. of Ex. P-18 was registered and the detailed report was forwarded to the senior police officers. The contraband was handed over to Malkhana and the seized samples were sent for chemical examination through Superintendent of Police to Forensic Science Laboratory, Raipur. After investigation, charge sheet was filed before the Special Court.

3. During trial 7 witnesses were examined. The appellant denied the allegation and stated that he was taken from his home and false case has been prepared against him. He also examined defence witnesses Rajji Ahmed (D.W.1), Dwarika Meshram (D.W. 2) in his defence.

4. Learned trial Court relying upon the statement of Sub Inspector K.K. Nag (P.W. 6) who has investigated the offence and filed charge sheet and further relying upon the statement of Motiram Sahu, Police Constable (P.W. 4), Khemlal, Head Constable (P.W. 5) and Tohanram Sahu, Head Constable (P.W. 7), convicted and sentenced the appellant as mentioned above.

5. Learned counsel for the appellant submits that the independent witnesses Ranapratap (P.W. 1), Nagendra Yadav (P.W. 2) and Abdul Majeed (P.W. 3) who are witnesses of documents from Ex. P-1 to Ex. P-11 prepared during investigation have not supported the prosecution case and they have categorically stated that they were made to sign in the papers in the police station by the police and no investigation was done in their presence and no contraband was seized before them from the accused. Even then, the Special Court has convicted the accused solely on the basis of uncorroborated statement of the Investigating Officer P.W. 6 K.K. Nag. He further submits that the house from where the contraband is alleged to be seized was not in exclusive possession of the appellant as other family members of the appellant also reside there and thus there is no evidence that the seized contraband was in exclusive possession of

the appellant. The learned trial Court has also not considered the statement of defence witnesses examined by the appellant. Reliance is placed on **Antony Sauri Pilley –v- State of Maharashtra**[1].

6. On the other hand, learned counsel for the State has supported the impugned judgment. Relying upon the judgment of the Supreme Court in the matter of **P.P. Fathima –v- State of Kerala**[2], it has been argued that in a case under N.D.P.S. Act, merely because Panch witness did not support the prosecution case by itself would not make the prosecution case any less acceptable if otherwise Court was satisfied that seizure was genuinely made. Further relying upon the judgment in the matter of **State of H.P. –v- Pawan Kumar**[3], it is argued that compliance of Section 50 of the N.D.P.S. Act is applicable where search is to be affected of any person and the same is not applicable where the contraband is seized from a house. In the instant case, the Investigating Officer after receiving secret information has recorded the same and after intimating the superior officers and recording reasons for not obtaining search warrant, has affected the search of the house of the accused after completing all the mandatory requirements under the NDPS Act. The version of the Investigating Officer is duly established from the documents prepared during investigation and duly proved during trial. The other police personnel who participated in the investigation have also supported the prosecution case.

7. I have heard learned counsel for the parties. I have perused the record as also the impugned judgment.

8. The Supreme Court in the matters of **P.P. Fathima**(supra) has held that where the Court is satisfied that the seizure of the contraband was genuinely made on the basis of statement of investigating officer, in such circumstances, the case of the prosecution cannot be disbelieved only on the ground that Panch witnesses did not support the prosecution case and they turned hostile. Similarly where the seizure of the contraband is affected not on the basis of personal search of the accused but the same is

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[1] 1993 Cri. L.J. 1502
[2] 2003(4) Crimes 390 (SC)
[3] (2005) 4 SCC 350

recovered from the house, in that case, mandatory provision of Section 50 of the Act giving option to the accused to be searched in presence of any magistrate or any gazetted officer is not the requirement of law as held in **State of H.P.** (supra).

9. We propose to scrutinize the evidence available on record in the present case in the light of the law laid down in the aforesaid cases.

10. Independent witnesses Ranapratap (P.W. 1), Nagendra Yadav (P.W. 2) and Abdul Majeed (P.W. 3) have not supported the case of the prosecution. Even in their cross-examination, the prosecution has not been able to elicit anything which supports the case of the prosecution though they have admitted the signatures over the documents from Ex. P-1 to Ex. P-11 which were prepared by the investigating agency. P.W. 4 Police Constable Motiram Sahu is witness of the fact that notice of Ex. P-12 addressed to City Superintendent of Police sent by S.H.O., Cantt. was received by him. Though the document of Ex. P-12 does not mention as to when this information was seen by the City Superintendent of Police. P.W. 5 Khemlal, Head Constable has proved that the contraband seized during investigation was deposited in Malkhana and receipt of Ex. P-16 was given.

11. P.W. 6 K.K. Nag is investigating officer. He has detailed the steps that were taken at the time of investigation by him. In short he has stated that after receiving secret information he forwarded the same to the City Superintendent of Police thereafter considering the urgency he proceeded for affecting search and seizure without obtaining search warrant after preparing the memo of Ex. P-1 and thereafter after giving notice to the appellant under Section 50 of the N.D.P.S. Act and after giving personal search of raiding party, the house of the accused was searched and contraband contained in a plastic bag was seized. The search recovery memo of Ex. P-4 was prepared and thereafter contraband was seized vide seizure memo of Ex. P-9. From perusal of the statement of this witness, it is evident that before affecting search of the house of the appellant, procedure prescribed under the NDPS Act was duly followed and the same was recorded. No suggestion has been put to this witness from the defence side that the house in question does not belong to the

appellant or that apart from the appellant, his other family members also reside in the room from where the contraband was seized. P.W. 7 Tohanlal, Head Constable had also gone with the Investigating Officer in patrolling duty and he accompanied him to the house of the appellant and he has also stated that before affecting seizure, they had given their personal search and only thereafter, the house of the accused was searched and the contraband was seized under a cot from a plastic bag.

12. The defence witness No. 1 Rajji Ahmed has also stated that at the time of incident, he had gone to the house of the appellant and was taking tea with him when the police personnel from Cantt. came to his house and called him to police station, however subsequently the accused was implicated in the offence. Thus from the statement of evidence of defence witness, it is clear that the house in question was belonging to the accused. The defence witness No. 2 Dwarika Meshram has stated that in the house of the accused, his mother, brother, sister, wife and children in all 8 to 9 persons reside with him and on the date of incident when the accused was talking with an advocate, the police constable took him to police station and the accused is not involved in trading of cannabis.

13. Thus from the evidence of P.W. 6 K.K. Nag, P.W. 7 Tohanlal as also statement of defence witnesses, the fact that the house from where the contraband was seized is the house of the appellant is established. Seizure memo of Ex. P-9 which is duly signed by the appellant and which has been proved by the Investigating Officer also mentions that 5.454 kg cannabis was seized from the house of the appellant. Therefore, the argument of learned counsel for the appellant that the prosecution has failed to prove exclusive possession cannot be accepted. The independent witnesses have admitted their signatures in the document Ex. P-1 to Ex. P-11 prepared during trial, though they have denied that any seizure was made in their presence from the accused and they have turned hostile. Statement of P.W. 6 K.K. Nag who has detailed the procedure adopted by him during investigation and which is also established by the documents annexed in the charge sheet and proved by this witness, inspires confidence of this Court that the contraband was genuinely seized from the house of the appellant. Therefore,

conviction of the appellant can be based on the solitary testimony of the Investigating Officer P.W. 6 K.K. Nag, as held in the judgment of **P.P. Fathima** (supra).

14. It is not in dispute that the appellant is the first offender and he was never involved in any case of identical nature in the past. 5.450 kg of cannabis was seized from his possession which is more than small quantity of 1 kg and less than the commercial quantity of 20 kg. Therefore, taking into consideration the quantity of the contraband seized from the appellant and also considering the fact that he is the first offender, this Court is of the considered opinion that ends of justice would be served if in place of sentence of 3 ½ years, the appellant is sentenced to undergo R.I. for 2 years.

15. Accordingly, the appeal is partly allowed. The conviction of the appellant under Section 8 (c) read with Section 20(b)(ii)(B) of N.D.P.S. Act is maintained, however his jail sentence is modified and in place of 3 ½ years R.I. with fine of 10,000/-, he is sentenced to undergo R.I. for two years with fine of Rs. 10,000/-, in default of payment of fine, to further undergo R.I. for six months.

Sd/-
Dhirendra Mishra
Judge